FEDERAL MARITIME COMMISSION

DOCKET NO. 14-06

SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and SYLVIA ROBLEDO d/b/a 81ST DOLPHIN PARKING

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES and THE GALVESTON PORT FACILITIES CORPORATION

RESPONDENTS THE GALVESTON WHARVES AND THE GALVESTON PORT FACILITIES CORPORATION'S REPLY TO COMPLAINANTS' EXCEPTION TO AND APPEAL OF INITIAL DECISION OF DECEMBER 4, 2015

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

The Board of Trustees of the Galveston Wharves and The Galveston Port Facilities Corporation (collectively "Respondents"), by and through the undersigned, pursuant to Federal Maritime Commission ("FMC") Rule 227, 46 C.F.R. § 502.227, file their Response to Complainants' Exception to and Appeal of Initial Decision of December 4, 2015, and would show the Commission as follows:

I. PRELIMINARY STATEMENT

Santa Fe Discount Cruise Parking, Inc., d/b/a EZ Cruise Parking, Lighthouse Parking, Inc. and Sylvia Robledo d/b/a 81st Dolphin Parking (collectively "Complainants") Except to and Appeal Judge Guthridge's Initial Decision in this matter issued on or about December 4, 2015, (hereinafter "ID"). Under Rule 227, Complainants had the right to "file a memorandum excepting to any conclusions, findings, or statements contained in such decision, and a brief in support of such memorandum." 46 U.S.C. § 502.227(a)(1). The Rule further states that, "Such exceptions and brief shall constitute one document, shall indicate with particularity alleged errors, shall indicate transcript page and exhibit number when referring to the record, and shall be served on all parties pursuant to subpart H of this part." *Id.*

As such, Complainants have a responsibility to do more than complain to the Commission that Judge Guthridge was "erroneous" or "incorrect." They must provide the Commission—and indeed Respondents—with direct references to all particular findings of fact and conclusions of law to which they except, and provide substantive legal and factual arguments as to why the Commission should disregard the well-reasoned and carefully considered decision by Judge Guthridge.

Complainants' only claim remaining prior to the December 4, 2015, Initial Decision was under 46 U.S.C. § 41106(2) which states:

> A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

46 U.S.C. § 41106(2). To prove this claim, Complainants had to meet the four elements of *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997):

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

Ceres, 27 S.R.R. at 1270–71. Judge Guthridge correctly found that Complainants failed to meet this burden. In submitting their exceptions and appeal, Complainants fail to set forth the factual basis for their exceptions and disagreements with Judge Guthridge. Complainants also fail to except to all but one of Judge Guthridge's 83 Findings of Fact. Complainants present nothing to lead the Commission to set aside the Initial Decision in whole or in part.

II. FACTUAL BACKGROUND

On October 27, 2003, the Port issued Tariff Circular No. 6, Naming Rules and Regulations Governing Dockage, Shed Hire, and Other Services and Charges Applying at the Facilities of the Galveston Wharves. ALJFF14. The 2003 Tariff Circular No. 6 defines "commercial passenger vehicle" as:

> [A] motor vehicle while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land, either:
>
> (A) in exchange for a fare, charge, or other thing of value (paid,

> demanded, or expected for the transportation service, in whole or in part, directly or indirectly, by the person transported or by another person, or otherwise); or
>
> (B) in connection with the operations of a commercial business entity, regardless of whether a fare, charge, or other thing of value is paid, demanded or expected for the transportation service.
>
> It shall be a presumption that a motor vehicle bearing the name, trade name, common name, emblem, trademark or other identification of a commercial business entity and being used to transport a passenger is a commercial passenger vehicle.

ALJFF 15.

The definition of "commercial passenger vehicle" was amended on December 17, 2007, by adding the underlined language to the opening clause, to read "a motor vehicle <u>not otherwise defined in this Tariff</u> while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land, either . . ." ALJFF 16. This language has not changed since then. ALJFF 17. Complainants operate commercial passenger vehicles. ALJFF 18.

Tariff Circular No. 6 defines a "ground transportation company" as:

> GROUND TRANSPORTATION COMPANY means any Person (other than the Galveston Wharves of any person or entity under contract to provide transportation services for the Galveston Wharves) owning or operating the following types of vehicles as defined in this section: commercial passenger vehicle, bus, bus service, charter bus, courtesy vehicle, shuttle, limousine, taxi or taxicab service.

ALJFF 19. This definition has not changed. Complainants are ground transportation companies. ALJFF 20-21. The Tariff also defines "off-port parking user."

> OFF-PORT PARKING USER means a commercial business entity which provides or arranges for one or more commercial passenger vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves.

ALJFF 21.

The only reference to "Off-Port Parking Users" in the 2003 Tariff was in the definition of "Courtesy Vehicles." In this definition, Off-Port Parking Users were expressly distinguished from lodging, air transportation, special events, medical care, and other industries. Resp. App. Tab 1 at p. 000019.[1]

In 2006, the Port amended the definition of "Off-Port Parking User" by inserting the phrase "courtesy vehicles" between "commercial passenger vehicles" and "buses or shuttles," ALJFF 23, but the definition has not changed since then. ALJFF 24. The definition of "Courtesy Vehicles" continued to distinguish Off-Port Parking Users from lodging and other industries. Resp. App. Tab 2 at p. 000093. Complainants are Off-Port Parking Users. ALJFF 25.

The 2003 Tariff Circular No. 6 required ground transportation companies to obtain a Port Use Permit by paying an initial licensing fee of $250.00 and an annual renewal fee of $50.00 to conduct activities on or in connection with the Cruise Terminal. ALJFF 26. It imposed an access fee on vehicles for each entry onto Port property:

Note C — In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27 (Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

Type of Vehicle	**Decal and access charge**
Bus, Charter Bus, Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Bus and	$10.00 per Access/Trip

[1] Judge Guthridge determined that the definition of "Off-Port Parking Users" could be construed to include hotels, but determined that the Port did not intend to require the hotels to use the flat rate, and that charging them access fees under the per-trip rate did not discriminate unreasonably against Complainants or in favor of hotels that provide parking to cruise passengers. ALJFF 26; ID at p. 34-35. Respondents disagree with ALJFF 26. When all provisions of Tariff Item 111, including the definition of "courtesy vehicle," are construed together, hotels are part of the lodging industry, which is expressly distinguished from "Off-Port Parking Users." Regardless, the end result is the same.

Shuttle or Bus [*sic*]	
Limousines	$10.00 per decal per vehicle, annually
Taxi and Taxicab	$7.50 per decal per vehicle, annually

ALJFF 29. The Port did not order collection of the access fees to begin until September 1, 2004, when the Board instructed Port staff to fully implement the Tariff and begin invoicing Port users for the access fee effective January 1, 2005. ALJFF 30. On May 20, 2005, the Port sent notice to Port users and included the first invoices for fees users had incurred since January 1, 2005. ALJFF 31.

Complainants did not pay the fee. ALJFF 32-34. On October 15, 2005, Complainant EZ Cruise wrote a letter to the Port claiming that the $10.00 fee for each trip was "too high and would greatly affect our ability to provide a quality service to the thousands of customers who come to Galveston each year to experience a cruise . . . ." ALJFF 36. EZ Cruise asked the Port not to charge Complainants on the basis of $10.00 per trip, but to charge them a flat monthly fee that would permit them unlimited access. EZ Cruise proposed:

> [A] flat rate of $1,000.00 per month for all shuttles used by EZ Cruise Parking, beginning January 2005. The flat fee is much easier for a start-up company, such as ours to budget and reflect expenses for reports at our monthly shareholder meetings. Billing 6 or 7 months at a time is extremely burdensome to a small, start-up company.

ALJFF 37.

Complainants and the Port entered into negotiations to resolve the access fees owed by Complainants and to discuss changing the Tariff. ALJFF 34. By the middle of 2006, EZ Cruise had not paid the Port for access fees charged from January 2005 to June 2006, Lighthouse had not paid for access from January 2006 when it began operations to June 2006, and Dolphin had

not paid for access from July 2005 when it began operations to June 2006. ALJFF 32-35. As part of the negotiations, on June 14, 2006, EZ Cruise proposed a payment of $20,000.00 to satisfy all outstanding Port access fees for EZ Cruise and for Galveston Limousine Service, Inc. (not a party in this proceeding) for trips in which Galveston Limousine Service, Inc. transported passengers for EZ Cruise for the period January 2005 to March 2006. ALJFF 38. EZ Cruise rejected the Port's proposal of a $2,500.00 flat monthly fee for unlimited access and offered a proposed monthly fee of $1,200.00. ALJFF 39.

After continued negotiations, the Port and Complainants eventually agreed to reduce Complainants' future access fees by adding Note D to Tariff Circular No. 6. Note D provided that in lieu of the $10.00 per trip access fee, parking lot operators would pay a flat access fee of $8.00 per month for each parking space in Complainants' lots. ALJFF40-43. This payment would permit unlimited access to the Cruise Terminal for Complainants' shuttles, meaning that Complainants would not pay increased fees for sending partially loaded shuttles to the Cruise Terminal instead of full shuttles. ALJFF 42. On August 28, 2006, the Port amended Tariff Circular No. 6 to revise the access fee to be paid by Off-Port Parking Users.

> Note D: Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The $8.00 Access Fee will be effective on and after August 15, 2006.

ALJFF 44. The August 28, 2006, amendment did not change the access fees imposed on commercial passenger vehicles by Note C. ALJFF 45. As noted above, the August 28, 2006,

amendment continued to distinguish Off-Port Parking Users from the lodging and other industries. Resp. App. Tab 2 at p. 000093.

Complainants and the Port also agreed to apply the $8.00 flat rate retroactively to January 2005 to recalculate access fees that Complainants had incurred at the per trip rate, but had not paid. ALJFF 46. The Port had invoiced EZ Cruise a total of $87,930.00 for access to the port between January 2005 and June 2006. ALJFF 47. As a result of the application of the $8.00 flat rate, EZ Cruise paid $35,680.00 for access between January 2005 and June 2006, saving $52,250.00. ALJFF 47. The Port had invoiced Lighthouse a total of $14,230.00 for access to the port between January 2005 and June 2006. As a result of the application of the flat rate, Lighthouse paid $9,120.00 for access between January 2005 and June 2006, saving $5,110.00. ALJFF 48. The Port had invoiced Dolphin a total of $25,430.00 for access to the port between January 2005 and June 2006. ALJFF 49. As a result of the application of the flat rate, Dolphin paid $11,520.00 for access between January 2005 and June 2006, saving $13,910.00. ALJFF 49.

The Port amended some provisions of Tariff Circular No. 6 in 2007, but did not change the $8.00 flat rate until shortly before Complainants commenced this proceeding. ALJFF 50-54. From 2006 to the date Complainants initiated this proceeding, the Port calculated access fees for Complainants at the $8.00 flat rate while it continued to calculate access fees for all other commercial passenger vehicles at the per trip rate as set forth in Note C.[2] ALJFF 81. At the request of Complainants and when appropriate, the Port adjusted the number of parking spaces used to calculate Complainants' access fees resulting in a decrease or increase in the monthly fee. ALJFF 55-58. Complainants did not object to using the $8.00 flat rate to calculate their access fees until shortly before they commenced this proceeding. ALJFF 59.

[2] Since 2003, the various amendments to the Tariff have continued to distinguish Off-Port Parking Users from lodging and other industries. *See* Resp. Tab 1 at p. 000019; Resp. Tab 2 at p. 000093; Resp. Tab 5 at p.000324 ; Resp. Tab 6 at p. 000395-397.

In the action that precipitated this proceeding, on May 19, 2014, the Port again amended Tariff Circular No. 6. The amended Tariff, effective July 1, 2014, adjusted the decal and per trip access fees imposed on ground transportation companies by Note C of the Tariff. ALJFF 64-65, 67. The Port also significantly increased the flat rate charged per parking space to Off-Port Parking Users, and used to calculate Complainants' fees for unlimited access to the Cruise Terminal, to $28.88 per parking space:

> Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $28.88 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The Access Fee will be effective on and after July 1, 2014.

ALJFF 66.

On June 16, 2014, Complainants initiated this proceeding by filing their Complaint alleging that the Port violated the Shipping Act. ALJFF 68. Complainants also filed a complaint in the United States District Court for the Southern District of Texas, seeking declaratory and injunctive relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and a preliminary injunction pursuant to the Shipping Act that would bar the Port from enforcing the amended Tariff. *See* 46 U.S.C. § 41306(a) ("After filing a complaint with the Federal Maritime Commission under section 41301 of this Title, the complainant may bring a civil action in a District Court of the United States to enjoin conduct in violation of this part."). On August 5, 2014, the District Court entered an agreed order permitting Complainants to deposit accruing monthly access fees in excess of $8.00 per parking space per month into the court registry. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, No. 3:14-

cv-00206 (S.D. Tex. Aug. 5, 2014) (Agreed Interim Order). ALJFF 69-70.

On September 22, 2014, the Port again amended the Tariff. ALJFF 71. Fees for ground transportation companies other than Off-Port Parking Users were not changed from the May 22, 2014, Tariff. ALJFF 72. The amended Tariff reverted to the rate of $8.00 per parking space per month for unlimited access for Off-Port Parking Users prior to October 1, 2014, and rescinded the provision that determined the monthly access fee for Off-Port Parking Users as a multiple of the number of parking spaces for access after October 1, 2014.

Note D: Prior to October, 1, 2014, those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. In addition, Off-Port Parking Users shall pay a decal fee of $15.00 per decal per vehicle annually. This Access Fee and decal fee will be effective until October 1, 2014.

> Beginning on October 1, 2014, all Off-Port Parking Users, as defined herein, shall be governed by the Provision of Note C above.

ALJFF 73. The Port assessed Complainants' access fees at the $8.00 flat rate for July—September 2014. ALJFF 74. After October 1, 2014, the Port returned to calculating Complainants' access fees using the per trip method as it had prior to the August 28, 2006, amendment. ALJFF 75-79.

III. PROCEDURAL BACKGROUND

Complainants filed their Original Complaint on or about June 24, 2014. A portion of the Original Complaint centered on the Port's May 19, 2014, amendment to the Tariff to raise the rate charged Complainants from $8 to $28.88 a space. The fees for all other users were raised as well at that time, with the base fee raised from $10 a trip to $20 a trip. Complainants were never required to actually pay this rate. On September 22, 2014, the Port rescinded the May 19, 2014, amendment and placed Complainants under the same fee schedule as other ground transportation companies accessing the cruise terminal.[3]

On or about October 24, 2014, Complainants filed their Amended Verified Complaint.

On or about November 21, 2014, Judge Guthridge dismissed all of Complainants' claims except for 46 U.S.C. § 41106(2). Complainants did not appeal that ruling and the Commission issued a Notice Not to Review same on December 23, 2014.

Evidence and briefs were presented to the Judge as scheduled, and on December 4, 2015, Judge Guthridge, after consideration of all claims not previously dismissed or abandoned by Complainants in their briefing, issued his Initial Decision dismissing Complainants' remaining claim with prejudice.

IV. ARGUMENT

A. RESPONSE TO COMPLAINANTS' SUMMARY OF THE EXCEPTIONS AND APPEAL.

[3] Contrary to Complainants' unsupported assertion, the Port did not admit the "validity of Complainants' allegations."

Complainants have submitted 15 specific exceptions to selected portions of Judge Guthridge's Initial Decision.

1. **Complainants take exception to the following statement on page 2 of the ID:**

   The Port continued to impose access fees on other commercial passenger vehicles accessing the Cruise Terminal at the per trip rate.

Response: Complainants' grounds for exception are both irrelevant and incorrect. Judge Guthridge ruled that taxis, hotels, limousines and buses were not substantially similar to Complainants' parking lot businesses. Therefore, under the *Ceres* standard, Complainants failed to prove their case. The treatment of dissimilar businesses is irrelevant. Further, for the time period referenced in the specific statement, given the context of the entire paragraph, 2005-2006, Complainants did not present any evidence to show that limousines were not being charged under the Tariff at the time the 2006 Tariff Amendment was adopted. The evidence demonstrates that limousine companies were being invoiced for access to the Cruise Terminal during that time frame. (See, e.g., Comp. App. at Tab 2 page at 00037).

2. **Complainants take exception to the following statement on page 5 of the ID:**

   Note D provides that in lieu of the $10.00 per trip access fee, parking lot operators pay a flat access fee of $8.00 per month for each parking space in Complainants' lots.

Response: The subject matter of this exception is repeated in various forms throughout Complainants' Exceptions and Appeal. Throughout their exceptions, Complainants repeatedly assert that lodging and other industries are included in the definition of "Off-Port Parking User." From the time that Access Fees were first included in the Tariff in 2003, the Tariff always distinguished "Off-Port Parking Users" from lodging and other industries. *See* Resp. Tab 1 at p. 000019; Resp. Tab 2 at p. 000093; Resp. Tab 5 at p.000324; Resp. Tab 6 at p. 000395-397. Complainants' subjective interpretation cannot change this fact.

Judge Guthridge correctly found that the provisions regarding "Off-Port Parking Users" were adopted as a result of negotiations between the Wharves and the Complainants after Complainants refused to pay a per trip fee, a fact not denied in this appeal. ALJFF 32-34, 36-37. Instead, the parties negotiated and settled upon the $8.00 per space rate. ALJFF 32-42. Deposition Testimony from principals of the Complainants admitted that this rate was a "deal" for them. Resp. App. Tab 83 at p. 2531. This "deal" was never contemplated by either Complainants or Respondents to apply to hotels. Resp. App. Tab 75 at p. 002072.

3. **Complainants take exception to the following statement[4] on page 24 of the ID:**

> **80. Between August 28, 2006, and October 1, 2014, Note D of Tariff Circular No. 6 did not provide a mechanism to determine "billable parking spaces" for hotels providing parking to cruise passengers with transportation to and from the cruise terminal.**

Response: Complainants' exception to this statement is based on their continued argument that hotels are "Off-Port Parking Users" under the Tariff. As demonstrated above, this is not the case.

Additionally, this exception is simply an argument that a method to determine "billable parking spaces" could be fashioned by some means. Judge Guthridge's statement reflects that the wording of the Tariff provided no mechanism for determining how hotel parking spaces could be billed on a flat rate basis, which is indisputably correct. Judge Guthridge is correct in using this fact to further support his finding that hotels were never intended to be subjected to a flat per space rate under the Tariff, nor were they ever subjected to such a rate.

Cruise passengers lodging at hotels were a vastly smaller percentage of hotel patronage. ALJFF 82. With only three to five percent of hotel lodgers also going on cruises, the Port could not reasonably attempt to charge hotels a flat fee for every space located at the hotel. Resp. App. Tab 88 at p. 2625, ¶ 6.

4. **Complainants take exception to the following statement on page 27 of the ID:**

> **Complainants also paid far less for each shuttle trip to the cruise terminal than hotels that provided parking to their customers in connection with an overnight visit and transported their customers to the cruise terminal in shuttles.**

Response: This exception is predicated on the proposition that the ID was "unclear" as to the time period being discussed. The time period referenced in this sentence is easily derived when reviewing the entire paragraph and the date references therein:

> When EZ Cruise approached the Port in 2005 . . . When the Port settled its claims against Complainants for unpaid access fees for the period through June 2006 by

[4] The "statement" referenced by Complainants is Finding of Fact No. 80 in the Initial Decision. This exception is the only specific exception to the 83 Findings of Fact made by Judge Guthridge. The failure to except to other findings should be deemed a waiver of any complaint or exception to the remaining Findings. 46 CFR § 502.227(a)(1) (outlining procedures required for excepting to finding by ALJ); 46 CFR 502.1 ("The rules in this part govern procedure before the Federal Maritime Commission . . ."). The Commission should accept the remaining Findings as true and correct.

applying the $8.00 flat rate to those accumulated fees, Complainants paid far less than the Port originally charged . . . Complainants also paid far less for each shuttle trip . . .

ID at p. 33. Complainants simply manufactured an alleged ambiguity to reiterate their arguments. Complainants also do not dispute that the 2006 change to a flat rate for their lots resulted in a significant savings to their lots. Finally, there was no intent to include hotels in the definition of "Off-Port Parking Users," as discussed above.

5. Complainants take exception to the following statement on page 33 of the ID:

Complainants compete with each other for cruise passengers who want to leave their vehicles in secure parking while they cruise.

Response: Complainants suggest that this sentence "implies" that the Judge found the hotel operations not to be similarly situated with the Complainants. Complainants simply state that this is "incorrect" without saying why. The context of the entire paragraph makes clear that there is no implication; there is a direct finding that the hotel operations are not similarly situated with the Complainants' lots.

As Judge Guthridge correctly observes, hotels "compete for cruise passengers who want or need ***lodging*** in Galveston prior to or after their cruises, and offer free parking and shuttle services as an inducement to their guests." ID at p. 33 (emphasis added). Unlike Complainants, the goal of a hotel is to fill its rooms, not its parking lot. ID at p. 29. Complainants have not presented any evidence to indicate that cruise passengers make up anything but a small percentage of the hotels' business. *Id.* Complainants do not compete with hotels because they are not in the same market as hotels—the market of cruise passengers who want or need to stay overnight in Galveston prior to or after their cruise. ID at p. 29.

6. Complainants take exception to the following statement on page 33 of the ID:

The unlimited access provision in the $8.00 flat rate provided a significant transportation advantage to Complainants.

Response: In making this exception, Complainants essentially admit that being granted unlimited access to the Cruise Terminal for a flat fee was a "significant" financial advantage. They attempt to counter this admission by claiming that "selective enforcement" (relating to taxicabs and limousines) "of the Tariff," when weighed with the financial benefit, resulted in a "disadvantage." As Judge Guthridge held that Complainants were not similarly situated with hotels, taxis, limousines and buses, any alleged "selective enforcement" of Tariff provisions relating to those entities is irrelevant. Further, there was no "selective enforcement" as to taxis because taxis were not charged access fees under the Tariff. ALJFF 29 and Resp. App. Tab 6 at 000391 (depicting taxis separately from other types of ground transportation services with no

access fee required). Judge Guthridge determined correctly that the Port's practices of not charging taxis as well as limousines for a period of time was within the Port's business discretion. Other than disagreeing with this finding, Complainants proffered no evidence to rebut it.

Further, the Port's expert, Jeffrey Compton, CPA, determined after reviewing all available records that the $8.00 per space rate resulted in significant financial savings to Complainants from 2006 until September 2014. Resp. App. Tab 7 at 000407. Complainants offered no rebutting expert opinion. Complainants failed to provide any evidence of the financial impact of their alleged "disadvantages." They provided only unsupported, self-serving arguments claiming that somehow, had they been charged the per trip rate (even though in 2005 and 2006 they refused to pay on that basis), they would have done business differently. The record evidence outweighs these unsupported allegations.

7. Complainants take exception to the following statement on page 34[5] of the ID:

> **Complainants do not identify any contemporary evidence to support a finding that during the negotiations between Complainants and the Port to resolve the access fees invoiced for the period January 2005 through June 2006 and development of the $8.00 flat rate, either Complainants or the Port contemplated applying the flat rate to hotels offering parking for cruise passengers.**

Response: In spite of this exception, Complainants do not actually dispute this finding. The overwhelming evidence in the record reflects that the $8.00 per space rate was to be charged only to those parking lots such as Complainants' lots, and no others. Since Complainants spent the better part of a year and a half haggling with the Port, refusing to pay on the same basis as others, and were given a special rate, it is completely disingenuous to now claim they do not know whether the 2006 Tariff providing for that negotiated flat rate only applied to them. Finally, there was no intent to include hotels in the definition of "Off-Port Parking Users," as discussed above.

8. Complainants take exception to the following statement on page 36[6] of the ID:

> **Limousine operations are substantially the same as taxicab operations. Likewise, I conclude that the decision not to charge access fees to limousines for access to the cruise terminal is a reasonable discretionary business decision of the Port.**

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[5] Incorrectly cited as Pg 33 in Complainants' Exceptions.

[6] Incorrectly cited as Pg. 33 in Complainants' Exceptions.

Response: Respondents' Proposed Findings Nos. 52 and 53 noted the similarities between taxis and limousines with factual support. Resp. App. Tab 85 at p. 002621. Some operational distinctions, such as limousines generally arriving from off Island while taxis were generally local, were noted, as well as the fact that local taxis were limited by City of Galveston Ordinance as to the types of fees they could charge. As the Initial Decision states in its extensive analysis, limousines and taxis are common carriers and do not operate parking facilities. ID at p.31. Their business is almost exclusively to transport members of the public from one place to another, as hired. *Id.* Complainants' business is to provide parking spaces for cruise passengers. Their shuttle service is offered for the sole purpose of enticing customers to leave their vehicles in parking lots owned and operated by Complainants and is merely incidental to their primary business—the renting of parking spaces to cruise passengers. ID at p.31. Complainants do not charge extra for the shuttle service. Resp. App. Tab 80 at 002314-2315; Resp. App. Tab 81 at 002418, lines 15-23; Tab 83 at 002520, lines 11-15. Complainants' exception here also essentially concedes that the treatment of taxicabs was justified under the circumstances.

9. Complainants take exception to the following statement on page 34 of the ID:

> **Complainants do not identify any evidence supporting a finding that the hotels they argue should have been assessed access fees calculated at the $8.00 flat rate- Holiday Inn, Moody Gardens, Comfort Inn & Suites on the Beach, and the other hotels identified in ALJFF 81- were start-up companies such as EZ Cruise for which the flat rate would be much easier to budget.**

Response: This exception does not deny the fact set forth by Judge Guthridge—that Complainants have no evidence to support a finding that anyone negotiating the $8.00 per space flat rate and drafting the amendments to the 2006 Tariff envisioned or intended hotels to pay the $8.00 rate. The reference to the term "start up" is directly related to the factual findings by Judge Guthridge—which are not disputed by Complainants—that, as a rationale for the negotiated $8.00 per space rate, Complainants described themselves as "start up" companies. Resp. App. Tab 53 at p. 001773; Resp. App. Tab 075 at p. 002072. Finally, there was no intent to include hotels in the definition of "Off-Port Parking Users," as discussed above.

10. Complainants take exception to the following statement on page 34 of the ID:

> **Complainants do not identify any evidence supporting a finding that when the Port amended the tariff, it intended to apply the flat rate to hotels in lieu of the per trip rate already applicable to hotel shuttles.**

Response: This exception is a repetition of the same argument raised several times by Complainants. Moreover, once again, this exception does not deny the facts set forth by Judge Guthridge—that Complainants have no evidence to support a finding that anyone negotiating the $8.00 per space flat rate and drafting the amendments to the 2006 Tariff envisioned or intended hotels to pay the $8.00 per space rate. Complainants suggest instead that the "intent" of the Tariff

is not relevant.[7] They are completely wrong. As late as December of 2015, the Commission discussed,

> Moreover, that the Shipping Act has no intent requirement and that "the mere doing of an unlawful act, whether part of a seemingly legitimate business decision or otherwise, constitutes a violation" is not relevant here. . . . The Court in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission* noted that reasonableness "does not depend on unlawful or discriminatory intent." 390 U.S. 261, 281 (1968). **A respondent's justifications for its conduct, however, are relevant to whether it violated the Shipping Act.** *See, e.g., Ceres*, 27 S.R.R. at 1274. And although "commercial convenience cannot justify a practice that is otherwise unreasonable," *Investigation of Free Time Practices - Port of San Diego*, 7 S.R.R. 307, 323 (FMC 1966), a port authority may consider a number of legitimate business considerations in operating a port and negotiating leases, such as market conditions, available locations and facilities, and the nature and character of potential lessees. *Ceres*, 27 S.R.R. at 1274; *see also "50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports*, 24 S.R.R. 411, 455 (FMC 1987) (listing "recognized transportation considerations"); *N. Atl. Mediterranean Freight Conference - Rates of Household Goods*, 9 S.R.R. 775, 784 (FMC 1967). Contrary to Maher's suggestion, whether a port authority has "business reasons" for its conduct is not irrelevant to its liability under the Shipping Act.

Maher Terminals, LLC v. The Port Authority of New York, et al., No. 12-02, 2015 WL 9426189, at *15 (FMC Dec. 18, 2015) (emphasis added). Complainants want to fashion a technical Shipping Act violation, predicated solely on their interpretation of the Tariff, to obtain attorneys' fees. However, the Port's intention and interpretation of its own Tariff, supported by the facts giving rise to the adoption of that Tariff (the negotiations for the $8.00 per space rate), establish that hotels were not part of the $8.00 per space rate. No technical violation occurred.

11. Complainants take exception to the following statement on page 35 of the ID:

> **(1) the $8.00 flat rate does not provide a mechanism to determine the number of billable parking spaces for [the] hotels; (2) developing a mechanism to determine access fees for determining the billable parking spaces of hotels that use only a small percentage of their parking spaces for cruise passenger**

[7] As the record amply reflects, the flat rate was the subject of year and a half long negotiations. ALJFF 37-44. No one conceived it to be interpreted as requiring the Port to charge hotels on an $8.00 per space per month basis as requested and agreed to by the Complainants in their "deal" with the Port. (Resp. App. Tab 78 at p. 002072; Resp. App. Tab. No. 69); (Resp. App. Tab 83 at p. 22).

is virtually impossible; and (3) there is no contemporaneous evidence that either the Port or Complainants intended to require these hotels to use the $8.00 flat rate in lieu of the $10.00 per trip access fee when the flat rate was adopted, the Port did not intend to require the hotels to use the flat rate.

Response: Once again, Complainants offer legal argument and suggest that it be given greater weight than the evidence presented in this case. For the first time in this proceeding, Complainants suggest that three percent of hotel parking spaces could be used to charge hotels. However, they admit they have no "study" or other evidence to support this suggestion, nor do they intent to attempt such a "study" or proffer any such evidence. Judge Guthridge's findings in this paragraph support a finding that the $8.00 per space rate was not enacted to apply to hotels. Complainants' actions in 2005 and 2006 show quite clearly that they had no desire to be charged on the same basis as hotels. They wanted a special, more favorable rate because of their "start up" situation. Resp. App. Tab 53 at 1773; Resp. App. Tab 075 at 2072. Judge Guthridge correctly found that the provision regarding "Off-Port Parking Users" was developed as a result of negotiations between the Wharves and Complainants after Complainants refused to pay a per trip fee. ALJFF 32-34, 36-37. These findings were not denied on appeal. Instead, the parties negotiated and settled upon the $8.00 per space rate. ALJFF 32-42. Deposition testimony of principals of the Complainants admitted that this rate was a "deal" for them. *See eg.* Resp. App. Tab 83 at p. 2531.

Complainants suggest that hotels could have been "required" to rope off "cruise passenger only" spaces. This is nothing more than a late, ad hoc guess. There is nothing in the record to support such a formula. The Tariff did not provide for it. The Tariff expressly stated that the monthly access fee would be "equal to the amount of $8.00 per parking space located at the Off-Port Parking Users' parking facility." This was confirmed in the definition of "billable parking spaces" added to the May 2014, Tariff. Resp. App. Tab 5 at p. 000323.

In any event, because Judge Guthridge also found that hotels were not similarly situated with the Complainants, this exception is irrelevant. Moreover, there was no intent to include hotels in the definition of "Off-Port Parking Users," as discussed above.

12. Complainants take exception to the following statement on page 42-43 of the ID:

Complainants do not cite to any contemporaneous evidence proving or even suggesting that the Port based the $8.00 flat figure on the "study" Complainants cite or any other study.

Response: Judge Guthridge discussed the alleged 2006 "study" extensively on pages 40 through 43 of the Initial Decision. Judge Guthridge determined that Complainants were taking Mr. Mierzwa's testimony completely out of context. When the entire discussion of the 2006 charts referenced by Complainants was reviewed, Judge Guthridge concluded that the "study"

referenced by Mierzwa was done in 2014. The 2006 compilation of usage was not used to create a formula based on percentage of use, as was attempted in 2014.

13. Complainants take exception to the following statement on page 51 of the ID:

> **Complainants did not subsidize other users as a result of the May 19, 2014, increase in the flat rate to $28.88.**

Response: Complainants offer no specific evidence to support this exception. Rather, they refer generally to "the Port's selective enforcement of the Tariff" and "unreasonable and advantageous low-cost, and even free, access to the Cruise Terminal to other users," "among other things."[8]

Additionally, this exception is irrelevant and yet another attempt to restate Complainants' issue with taxis and limousines, which Judge Guthridge held were not similarly situated with Complainants. Complainants have added, for the first time, an allegation that the rates charged others (without proof or specificity) were "unreasonable and advantageous low-cost," while the Complainants were charged "full price." As Judge Guthridge noted, the $8.00 per space rate was the "advantageous low-cost" rate charged Complainants because for over a year and a half, they refused to pay the same rate as other users of the Cruise Terminal.

Furthermore, the evidence again prevails over Complainants' legal argument. Respondents' expert, CPA Jeffrey Compton, reviewed the data and Complainants' alleged "subsidy damages" and opined, based on his expertise and analysis, that Complainants had no support for their claims. Resp. Tab 103 at 002767 – 2769. Mr. Compton also specifically noted that if the Port failed to collect fees from some users, there was nothing to support a claim that this caused Complainants to pay more than what they were being charged under the Tariff. *Id.* at p. 002769. Complainants wholly failed to prove a subsidy or the economic "disadvantage" of any such alleged subsidy.

14. Complainants take exception to the following statement on page 52 of the ID:

> **Complainants do not cite any authority that would support a conclusion that when a regulated entity charges one (or several) customers at amounts less than the tariff rate, it has unreasonably imposed an undue or unreasonable prejudice or disadvantage in violation of section 41106(2) with respect to all other customers who paid the tariff rate.**

Response: As Judge Guthridge noted, the $8.00 per space rate "provided a significant transportation advantage to Complainants." ID at p. 26. Complainants were charged this rate because for over a year and a half, they refused to pay the same rate as other users of the cruise terminal. *Id.* Judge Guthridge also noted there is no authority holding that charging one customer a different rate creates a violation. ID at p. 53. Applying the *Ceres* standard, Judge Guthridge

[8] See Complainants' Exceptions, p.8.

correctly found that Complainants were not similarly situated and that Complainants failed to prove, by a preponderance of the evidence, any economic harm or disadvantage. ID at p. 53. Complainants presented no proof of any kind that they were being forced to subsidize the Cruise Terminal by paying what the Tariff required.

15. Complainants take exception to the following statement on page 52 of the ID:

> **Even assuming that Complainants have proved that the Port violated section 41106(2), Complainants have not proved by a preponderance of the evidence that they suffered any actual injury from the violation.**

Response: Complainants had the burden of proof on damages. They failed to present a single piece of evidence that would prove injury with reasonable probability. Their first argument is nonsensical—it states that others were granted undue and unreasonable preference and advantages, *which they relied on,* and suffered actual injury.

Their second argument is conclusory, simply stating as a given without any evidentiary support that they "subsidized" other Cruise Terminal users.

Complainants then proceed to essentially argue, for the first time in this proceeding and with no authority of any kind, that the Coble Act[9] has altered the *Ceres* elements to allow them to be a prevailing party. They suggest that if the Commission would accept their interpretation of the application of the $8.00 per space rate applying to hotels, then they "win" due to a technical violation, regardless of anyone's intent. This is wrong and this Commission has rejected the concept that the intent of the parties is irrelevant. *See Maher Terminals*, 2015 WL 9426189, at *15. Complainants want to fashion a technical Shipping Act violation to obtain attorneys' fees, solely predicated on their interpretation of the Tariff. However, the Port's intention and interpretation of its own Tariff, supported by the facts giving rise to the adoption of that Tariff (the negotiations for the $8.00 per space rate), establish that hotels were not part of the $8.00 per space rate. No technical violation occurred. Beyond that, since Judge Guthridge determined that Complainants are not similarly situated with hotels, taxis, and limousines, Complainants still cannot meet the *Ceres* standard. Finally, there was no intent to include hotels in the definition of "Off-Port Parking Users," as discussed above.

[9]Public Law No. 113-281, Howard Coble Coast Guard and Maritime Transportation Act of 2014, Howard Coble Coast Guard and Maritime Transportation Act of 2014 (Dec. 18, 2014) ("Coble Act").

DISCUSSION

I. LEGAL STANDARDS

A. COMMISSION RULE OF PRACTICE AND PROCEDURE 227

Respondents agree that the Commission shall review the Initial Decision under a *de novo* standard of review. 46 C.F.R. § 502.227(a)(6).

B. SHIPPING ACT VIOLATIONS ALLEGED IN THE ORIGINAL AND FIRST AMENDED COMPLAINTS THAT ARE NOW MOOT

Complainant's reiteration of their First Amended Verified Complaint is surplusage. Complainants did not appeal or seek further review of Judge Guthridge's rulings in his November 21, 2014, Order dismissing all of Complainants' allegations except those under 46 U.S.C. § 41106(2). That Order is final per the Commission's December 23, 2014 Notice Not to Review. Complainants cannot seek reconsideration of that order at this stage. 46 C.F.R. § 502.153(b). Thus, Complainants' references to violations of 46 U.S.C. § 41102(c) on pages 10 and 12-13 of their Exceptions, and their references to violations of 46 U.S.C. § 41106(3) on pages 11-12 and 14-15 of their Exceptions are moot.

C. REMAINING SHIPPING ACT VIOLATIONS ALLEGED IN THE FIRST AMENDED VERIFIED COMPLAINT

The only live claim that is subject to this appeal is Complainants' allegation that Respondents violated 46 U.S.C. § 41106(2). Judge Guthridge correctly stated the elements and standard of proof for such a claim:

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

I.D. at p.8 (citing *Ceres*, 27 S.R.R. at 1270–71).

II. UNDISPUTED FINDINGS OF FACT

Complainants did not expressly take exception to any enumerated Findings of Fact set forth by Judge Guthridge in his Initial Decision, except for Finding No. 80.[10] All other Findings of Fact should be deemed undisputed and any exceptions and appeal of the same waived. 46 CFR § 502.227(a)(1) (outlining procedures required for excepting to finding by ALJ); 46 CFR § 502.1 ("The rules in this part govern procedure before the Federal Maritime Commission . . ."); *see also Green Master Int'l Freight Services Ltd.*, No. 01-10, 2003 WL 1016920, at *12 (FMC Feb. 28, 2003) (rejecting exception where party "did not provide any credible evidence to substantiate its claim . . . nor has it shown that the ALJ erred in weighing the evidence.").

III. SUBSTANTIVE ERRORS AND EXCEPTIONS

A. THE INITIAL DECISION CONSIDERED ALL ISSUES FORMING THE BASIS OF THE COMPLAINT.

Complainants suggest to the Commission that Judge Guthridge's Initial Decision failed to address six additional "claims" raised in the First Amended Verified Complaint:

> 1. However, upon information and belief, the Wharves Board has not enforced or collected same from any such hotel since inception of the Tariff. By contrast, the Wharves Board has enforced and collected Access Fees from Complainants since inception of the Tariff. This, in and of itself, has created a substantial loss of revenue to the Cruise Terminal, and resulted in the situation at bar; that is, Complainants are now being asked to subsidize Respondents' past and future failures to implement, enforce, and collect Access Fees under the Tariff from these other Off-Port Parking Users. First Amend. Comp. at pp. 22-23.
>
> 2. Upon information and belief, Respondents have historically failed to charge and/or collect Access Fees from a material percentage - if not a majority - of

[10] Complainant's Exception No. 3, p. 3.

commercial vehicles that have accessed the Cruise Terminal since the Tariff s inception. As such, Respondents have forced Complainants to subsidize other non-paying users' share of Cruise Terminal costs, providing those users with an undue preference or advantage over Complainants. First Amend. Comp. at p.25.

3. Imposing an unreasonable, unduly prejudicial, and discriminatory allocation of the Cruise Terminal's costs upon Complainants, but not other users of the Respondent's services under Tariff Circular No. 6, Item 111- Other Licenses and Permits. First Amend. Comp. at p.29.

4. Unreasonably and unjustifiably modifying and/or increasing the Access Fee (for the third time in nine months) under the Tariff for Complainants. First Amend. Comp. at p.29.

5. Unreasonably discriminating against Complainants by imposing an unfair and disproportionate increase in Access Fees in comparison to increases, if any, imposed on other users of Respondents' services under Tariff Circular No. 6, Item 111 - Other Licenses and Permits. First Amend. Comp. at p.29.

6. Unreasonably, unjustifiably, unfairly, and with undue prejudice, refusing to observe, implement, enforce and collect Access Fees from all Commercial Passenger Vehicles accessing the Cruise Terminal. First Amend. Comp. at p.29.

Complainants suggest that each of these allegations were preserved by the following paragraph:

> Through disparate treatment of Complainants based on Tariff rates charged, and in the form of Respondents' preferential exclusion of certain port users from collection of Access Fees, coupled with Respondents' selective enforcement of the Tariff, Complainants have been burdened with an unjust economic disadvantage and a resulting *de facto* subsidization of benefits received by other Cruise Terminal users who are similarly situated and/or in a competitive relationship with Complainants.[11]

Complainants' First Amended Verified Complaint contained a series of repetitive allegations that all fell within their claim of a violation of 46 U.S.C. § 41106(2). In their briefing and argument to Judge Guthridge, Complainants did not argue these allegations specifically. Thus, these claims fail. Additionally, Judge Guthridge disposed of each of the claims. As to the enumerated list above, the Initial Decision discusses and disposes of them on the following pages:

[11] *See* Complainants' Exceptions, p. 17, citing Comp. Br. at 13).

Complainants' Argument	ID Page Where Considered	Disposition by Judge Guthridge
However, upon information and belief, the Wharves Board has not enforced or collected same from any such hotel since inception of the Tariff. By contrast, the Wharves Board has enforced and collected Access Fees from Complainants since inception of the Tariff. This, in and of itself, has created a substantial loss of revenue to the Cruise Terminal, and resulted in the situation at bar; that is, Complainants are now being asked to subsidize Respondents' past and future failures to implement, enforce, and collect Access Fees under the Tariff from these other Off-Port Parking Users. First Amend. Comp. at p. 22-23.	P. 32-33; 35-36	Judge Guthridge discussed the facts surrounding the Port's use of its discretionary authority. Judge Guthridge also noted the economic benefit of the flat rate and the lack of injury to Complainants as a result of the flat rate.
Respondents have historically failed to charge and/or collect Access Fees from a material percentage—if not a majority—of commercial vehicles that have accessed the Cruise Terminal since the Tariff's inception. As such, Respondents have forced Complainants to subsidize other non-paying users share of Cruise Terminal costs, providing those users with an undue preference or advantage over Complainants. First Amend. Comp. at p. 25.	P. 32-33, 35-36, 51	Judge Guthridge discussed the Port's Tariff, the application of the Tariff and which rates applied to which users. For any users not charged, Judge Guthridge discussed the facts surrounding the Port's use of its discretionary authority. Judge Guthridge also noted the economic benefit of the flat rate and the lack of injury to Complainants as a result of the flat rate.
Respondents have imposed an unreasonable, unduly prejudicial, and discriminatory allocation of the Cruise Terminal's costs upon Complainants, but not other users of Respondent's services, under Tariff Circular No. 6, Item 111- Other Licenses and Permits. First Amend. Comp. at p. 29.	P. 42-43, 52	This allegation was based on the allegation that a 2006 "study" used such an allocation. Judge Guthridge debunked this claim.
Respondents unreasonably and unjustifiably modified and/or increased the Access Fees	November 21, 2014,	Judge Guthridge's Findings of Fact found that the "first"

Complainants' Argument	ID Page Where Considered	Disposition by Judge Guthridge
(for the third time in nine months) under the Tariff for Complainants. First Amend. Comp. at p. 29.	Partial Dismissal at p. 2, 15; ALJFF 60-61 and I.D. at p. 15-16	time referenced in this allegation was when the Port mistakenly posted an amended Tariff that was never approved. ALJFF 60-61. Complainants were never charged under this mistaken posting. Additionally, in his Partial Dismissal of November 21, 2014, Judge Guthridge dismissed all of Complainants' claims except for 46 U.S.C. § 41106(2). This included claims involving the "second" time, the May 2014 rate that was rescinded. Further, Judge Guthridge noted in his Initial Decision that the "second" rate was issued in error, never charged to Complainants and withdrawn by the Port. See ALJFF 61 re: 2013 "revision.' Complainants' made no allegations of any impropriety of the "third" time, which was the September 2014 amendment that eliminated the flat rate and made Complainants pay the same rate as all other users.
Respondents unreasonably discriminated against Complainants by imposing an unfair and disproportionate increase in Access Fees in comparison to increases, if any, imposed on other users of Respondents' services under Tariff Circular No. 6, Item 111- Other Licenses and Permits. First Amend. Comp. at p. 29.	Pg 32-33, 35-36, 51	This is duplicative of the allegation discussed above.
Respondents unreasonably, unjustifiably,	Pg 32-33, 35-	This is duplicative of the first

Complainants' Argument	ID Page Where Considered	Disposition by Judge Guthridge
unfairly, and with undue prejudice, refused to observe, implement, enforce and collect Access Fees from all Commercial Passenger Vehicles accessing the Cruise Terminal. First Amend. Comp. at p. 29.	36, 51	allegation discussed above.
Through disparate treatment of Complainants based on Tariff rates charged, and in the form of Respondents' preferential exclusion of certain Port users from collection of Access Fees, coupled with Respondents' selective enforcement of the Tariff, Complainants have been burdened with an unjust economic disadvantage and a resulting *de facto* subsidization of benefits received by other Cruise Terminal users who are similarly situated and/or in a competitive relationship with Complainants. Comp. Br. at p. 13.	Pg 32-33, 35-36, 51	This is duplicative of the first allegation discussed above.

None of these "ignored" claims were ignored. Judge Guthridge disposed of all claims.

B. THE INITIAL DECISION CORRECTLY FOUND THAT COMPLAINTS HAVE NOT SATISFACTORILY PROVEN VIOLATIONS OF SECTION 41106(2)

1. The Initial Decision correctly found that the Port properly exercised "discretionary business decisions."

Complainants assert that apart from their disparate treatment claim, caused by the August 2006 amended Tariff, the Initial Decision is silent as to all other alleged violations of 41106(2).[12] Complainants then assert generally that the Port selectively enforced its Tariff, while they relied on the Tariff to "inform them on the access fees paid by other Cruise Terminal users and as a basis for business decisions and expectations."[13] Complainants offer no specifics whatsoever as to these alleged "violations," alleged "disparate treatment," and "business decisions and

[12] See Complainants' Exceptions, p.17.
[13] *Id.* p.18.

expectations" forming the basis of these claims. Therefore, these claims fail. *Green Master Int'l Freight Services Ltd.*, 2003 WL 1016920, at *12 (rejecting exception where party "did not provide any credible evidence to substantiate its claim . . . nor has it shown that the ALJ erred in weighing the evidence.").

Essentially, Complainants appear to suggest that since the Port did not adhere to the interpretation of the Tariff they proffered for this proceeding in charging access fees to others, the Port violated the Shipping Act.

As Judge Guthridge explained in considerable detail, the Tariff was changed in 2006 because the Complainants refused to pay what others were being charged and wanted a better deal. ALJFF 30-49. None of these findings are challenged in Complainant's Exceptions and Appeal. Complainants negotiated for a change in the Tariff to charge them $8.00 per space per month rate, in exchange for being granted unlimited access to the Cruise Terminal for that fee. The rate reduction allowed the Complainants to save over $70,000.00 collectively. ALJFF 47-49. During the first half of 2006, the three Complainants accessed the Cruise Terminal more times than all the hotels put together. *See* Resp. App. Tab 058 at p.1790.

Complainants do not dispute Judge Guthridge's recitation of facts as to the year and a half long negotiations between the Port and Complainants that resulted in Complainants being granted the $8.00 per space per month flat rate. ALJFF 35-43. Complainants do not dispute Judge Guthridge's finding that the Tariff was amended in 2006 to reflect this agreement. ALJFF 44. And Complainants do not dispute that the Port never intended the 2006 flat rate change to apply to hotels.

Judge Guthridge ruled that the Port has discretion to exercise business judgment when imposing access fees. ID at p. 20. Judge Guthridge's finding is consistent with Commission

precedent. The Commission has "recognized that it is proper to give deference to a port's discretionary business decisions." *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 899 (FMC 1993) (citing *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974 (1986), *aff'd* 853 F.2d 958 (D.C. Cir. 1988)); *Cornell v. Princess Cruise Lines, Ltd.*, No. 13-02, 2014 WL 5316340, at *8 (FMC Aug. 28, 2014). In *Petchem*, the Commission recognized that it is proper to give deference to a port's discretionary business decisions. The Commission's decision in that case was "partially based on appropriate deference to the Port Authority, an entity familiar with business circumstances . . . and entitled to a presumption that it is concerned with public and not private interest." 23 S.R.R. at 993; *see also Seacon Terminals, Inc.*, 1993 WL 197325, at *19; *In the Matter of Agreement No. T-2598*, 17 F.M.C. 286, 297 (1974) ("[T]he duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance.").

The Commission has also repeatedly held that not every preference or prejudice is unlawful under the Shipping Act, but only those that are undue or unreasonable. *ITO Corp. of Baltimore and the Maryland Port Admin.*, No. 94-10, 1995 WL 610825, at *22 (FMC Oct. 26, 1995). The Commission is also not required to tally and compare exactly what benefits were received by the relevant parties. In *Petchem*, the D.C. Circuit noted that "[t]he Act clearly contemplates the existence of permissible preferences and prejudices." 853 F.2d at 963. Only *undue or unreasonable* preferences and prejudices would be violative of the Prohibited Acts.

After all the negotiations with the Complainants who refused to pay a per trip charge, it was within the Port's discretion to negotiate and charge the flat rate and apply it to Complainants and other parking lot operators.[14] There is no evidence presented by the Complainants that this

[14] ID at p. 27.

"deal" as Complainants have referred to it was intended to apply to anyone but parking lot operators.

Complainants also offer no evidence to prove that the Port acted unreasonably in its treatment of taxis. As to limousines, the Complainants assert that the failure to charge some of these users was due to an error and therefore not "discretionary." They miss the point of Judge Guthridge's discussion. The Port's undisputed evidence established that collections from limousines were sporadic and difficult. Resp. App. Tab 77 at p. 002086, ¶ 24. Limousines represented a very small percentage of users. *Id.* Once the collection error was discovered, billings resumed but collections have remained difficult. Resp. Br. 21, fn. 5; Resp. App. Tab 77 at p. 002087, ¶ 26-27. The Port had the discretion to simply move forward once the error was discovered. This is not a violation.

Complainants argue that Judge Guthridge's Initial Decision does not address "all other violations of 41106(2)."[15] As noted above, those alleged "violations" are conclusory and are nothing more than restatements of allegations raised in the Complaint which were discussed and dismissed by Judge Guthridge.

Finally, Complainants' argument is irrelevant. As Judge Guthridge held, Complainants are not similarly situated with hotels, limousines or taxis. ID at p. 30–32. As such, they fail to establish a violation under *Ceres*.

C. THE INITIAL DECISION CORRECTLY FOUND THAT COMPLAINANTS DO NOT MEET THE *CERES* ELEMENTS

Complainants except to Judge Guthridge's rulings that they failed to meet most of the prongs of the *Ceres* standard. With each exception, Complainants ignore their burden to prove

[15] Complainants' Exceptions at p. 17.

that they meet each element. *See Ceres*, 27 S.R.R. at 1270–71. As the Commission noted in *Ceres*,

> [Complainants have] the burden of proving, by a preponderance of the evidence, that the Port violated the Shipping Act, and this burden of persuasion does not shift. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Revocation of Ocean Transportation Intermediary License No. 022025 Cargologic USA LLC*, Docket No. 14-01, 2014 FMC LEXIS 18, at *8 (FMC Aug. 28, 2014); *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, 32 S.R.R. 763, 765 (FMC 2012)

Id.

Complainants bear the ultimate burden of proving that the Port acted unreasonably. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 349, 376 (ALJ 2014) (Initial Decision) (citing *Maher v. Port Auth. of N.Y. & N.J.*, 32 S.R.R. 1185, 1193 (FMC 2013)); *West Gulf Maritime Assoc. v. Port of Houston*, 18 S.R.R. 783, 791 (FMC 1978) ("the burden of establishing the unreasonableness of a practice is squarely upon [the complainant]"); *see also* 5 U.S.C. § 556(d) (stating that "the proponent of a rule or order has the burden of proof"); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (holding that "the APA's unadorned reference to 'burden of proof' refers to the burden of persuasion"). Complainants failed to meet this burden as to any of their claims.

1. The Initial Decision Correctly Found that Complainants Are Not Similarly Situated Or In A Competitive Relationship With Hotels

Complainants assert that even though hotels provide parking to guests that stay one night or more at the hotel, they are nevertheless similarly situated and compete with Complainants. Complainants offer no evidence or even an explanation for this conclusory statement. *Green Master Int'l Freight Services Ltd.*, 2003 WL 1016920, at *12 (rejecting exception where party "did not provide any credible evidence to substantiate its claim . . . nor has it shown that the ALJ erred in weighing the evidence."). Furthermore, cruise passengers who are paying guests at a

hotel no longer need a secure place to store their vehicles in Galveston for the duration of their cruise. Thus by definition, Complainants are not competing for these passengers.

The record is replete and uncontested as to the incidental nature of cruise passengers transported to the terminal by hotels. The arguments raised by Complainants in their Exceptions proffer no citations to any of the thousands of pages of records that allegedly contradict Judge Guthridge's finding that the "goal of a hotel is to fill its rooms, not its parking lot" and that "Complainants do not operate hotels and are not in competition for the market of cruise passengers who want or need to stay overnight in Galveston."[16] Hotels offer parking and transport to the Terminal incident to lodging. The Complainants offer transportation to the Cruise Terminal incident to providing parking for the duration of the cruise. The two are not similar industries or types of businesses and do not compete for the same type of customers.

2. The Initial Decision Correctly Found that Complainants Are Not Similarly Situated Or In A Competitive Relationship With Other Ground Transportation Entities

Complainants except to Judge Guthridge's ruling that they are not similarly situated or in a competitive relationship with taxicabs, limousines and buses. [17] However, Complainants offer no argument and proffer no evidence from the record as to how they would be similarly situated or in a competitive relationship with taxicabs, limousines and buses. *Green Master Int'l Freight Services Ltd.*, 2003 WL 1016920, at *12 (rejecting exception where party "did not provide any credible evidence to substantiate its claim . . . nor has it shown that the ALJ erred in weighing the evidence."). As previously stated, this is their burden and they again have failed to meet it. Complainants suggest that the fact that they own and operate parking lots for cruise passengers and that taxicabs, limousines and buses do not is somehow irrelevant.

[16] ID at p. 29.

[17] Complainants' Exceptions p. 20.

The record reflects that even Complainants did not consider taxicabs competitors.[18] Resp. App. Tab 83 at p. 002546, lines 18-20. Judge Guthridge's analysis is factually and legally correct. Complainants offer nothing to rebut his decision.

3. The Initial Decision Correctly Found that Complainants Have Not Proved by a Preponderance of the Evidence that the Port Unreasonably Gave Preferential Treatment to Hotels.

Complainants argue that they did show that the Port "unreasonably" gave preferential treatment to hotels.[19] Their entire argument is predicated on the definition of "Off-Port Parking User" as written in the 2006 Tariff. Complainants do not dispute that the Tariff was written as a result of the 2006 negotiations and settlement between the Port and Complainants. Complainants do not dispute that there is no evidence that anyone—the Port, Complainants or the hotels—understood the Tariff to require hotels to pay the $8.00 per space per month flat rate. Complainants do not dispute that hotels did not have the benefit of unlimited access for a flat rate given to Complainants.[20] They also proffered nothing to negate the evidence showing that Complainants received a significant economic benefit from the 2006 settlement and the flat rate they paid afterwards. Instead, they argue that if hotels could be construed to be "Off-Port Parking Users" and were not charged the flat rate, this violated the Shipping Act.

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[18] The way a taxicab operates and is regulated is completely different as well. For example, the City of Galveston strictly regulates taxicab fares. Resp. App. Tab 40 at p. 001707. Normally, a taxicab cannot refuse to convey a person requesting service unless some threat or unlawful activity is taking place. Complainants can refuse to transport anyone not using their parking lots and are not under price regulation by the City.

[19] Complainants' Exceptions, p. 20.

[20] Complainants even make reference to Texas decisions regarding parol evidence when reviewing unambiguous contracts as support for their claim. See Complainants' Exceptions, p.22. The parol evidence rule is a rule involving contracts, not tariffs. Further, Complainants' argument on this basis is irrelevant given their concession regarding the tariff negotiations and the lack of any evidence that anyone understood the Tariff as requiring hotels to pay the $8.00 per space per month flat rate. The Port's interpretation and application of its own Tariff, under these circumstances, supports Judge Guthridge's findings.

The Complainants offer nothing to demonstrate how paying the flat rate for unlimited access while hotels paid for each and every trip to the Cruise Terminal was unreasonable. They also ignore the fact that for a year and a half Complainants refused to be charged on the same basis as hotels. The Complainants created this situation by demanding that they be treated differently due to their "start up" status. *See* ALJFF 36–37. Complainants also ignore the undisputed findings that they thrived under this rate from 2006 until 2014, when the Port decided it needed to raise the access fee rates to pay for the cost of operating the Cruise Terminal. ID at p. 48–49. Instead, Complainants seek a finding that being charged the flat rate violated the Shipping Act if hotels were not also charged a flat rate. That is, it does not matter the impact, result or intent: if the Port did not charge hotels the flat rate under the Tariff, then Complainants have proved their case. Lacking in this argument is how the differentiation in rates was "unreasonable."[21]

Judge Guthridge's discussion as to why hotels were never meant to be charged on the flat rate basis is unchallenged by Complainants. They simply suggest they did not know the Port's "intent" when the Tariff was written. Since it is undisputed that they asked for the rate, refused to pay any other rate, negotiated the rate, and then settled on the rate, Complainants' argument is completely disingenuous. There was no "selective enforcement" because the flat rate was never to be charged hotels—only to Complainants. Further, the fact that Complainants' businesses are not similarly situated to or in a competitive relationship with hotels renders this entire argument irrelevant. Finally, as noted above the Port never intended to treat hotels as Off-Port Parking Users.

[21] Neither the Shipping Act nor the Commission's regulations include a specific definition of the term "unreasonable." The common definition of the term is simply "not fair, sensible, or appropriate." Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/unreasonable (*last visited* Jan. 21, 2016). It seems ludicrous for Complainants to declare the flat rate "unreasonable" when they so vehemently argued for it as being more fair, sensible and appropriate for their business in 2006.

4. The Initial Decision Correctly Found that Complainants Have Not Proved by a Preponderance of the Evidence that the Port Unreasonably Gave Preferential Treatment to Taxicabs, Limousines, and Buses

Complainants' exception to Judge Guthridge's rulings regarding no unreasonable preferential treatment of taxicabs, limousines and buses is simply repetitive of other arguments raised by Complainants and equally fallacious. Judge Guthridge correctly noted that these types of entities are not similarly situated to, nor are they in a competitive relationship with, Complainants. ID at p. 32. Complainants did not except to any findings of fact regarding the operations of these entities.

With regard to how it came to be that limousines were not charged access fees for a period of time, it is clear from the facts that once the Port discovered the billing errors the Port decided to enforce the Tariff prospectively. The decision not to try to collect from the limousines, a difficult task as the evidence demonstrated, was within the discretionary powers allowed the Port. *See Maher*, 33 S.R.R. at 841, 853. The error did not constitute "unreasonable" disparate treatment and certainly does not give rise to a Shipping Act violation.

5. Complainants do not Except to the Initial Decision Finding that Complainants Failed to Prove Undue or Unreasonable Prejudice

Since its decision almost twenty years ago in *Ceres*, the Commission has repeatedly stated that all elements of the *Ceres* standard must be met by a complainant to prove a violation of the Shipping Act. Judge Guthridge correctly cited Commission precedent in stating:

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that . . . (4) the resulting prejudice or disadvantage is the proximate cause of the injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

ID at p. 8.

Complainants did not except to Judge Guthridge's further statements of the law regarding proof of injury:

> Complainants have the burden of proving entitlement to reparations. 5 U.S.C. § 556(d). As the Federal Maritime Board explained long ago: "(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation." *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (FMC 2003).
>
> The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

ID at p. 29.

Complainants only exception to Judge Guthridge's findings that Complainants failed to meet this long standing burden is on page 9, Exception 15 which states:

> Complainants' injury from Respondents' conduct referenced in the above statement is twofold. First, by granting other ground transportation companies and "Off-Port Parking Users" undue and unreasonable preference and advantage in the assessment of Access Fees prescribed by the Tariff and relied upon by Complainants in the decision making and operation of their businesses, complainants suffered actual injury. Second, Respondents' conduct spanned many years and resulted in Respondents increase of Complainants' Access Fees. Complainants were injured by being caused to subsidize other Cruise Terminal users' use of the Cruise Terminal. Additionally and significantly, should the Commission rule that the Coble Act applies to this matter despite Complainants' showing below, this issue would be moot as Complainants could still be deemed "prevailing parties" upon a showing of Respondents' violations, and may recover their attorney fees regardless of a showing of actual injury.

Lacking in this argument is any statement, any proffer or anything the Commission could use to rely upon to determine that Judge Guthridge was incorrect in finding that

> The burden is on Complainants to prove their damages with reasonable certainty. *Tractors and Farm Equip. Lid. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. at 798-799. Assuming that the Port violated section 41106(2) when it calculated Complainants' access fees using the $8.00 flat rate, Complainants' argument does not prove by a preponderance of the evidence that Complainants suffered actual injury from use of the flat rate.

ID at p. 38. The evidence actually proved the opposite. Complainants enjoyed a substantial benefit from the flat rate. ID at p.48–49; *see also Green Master Int'l Freight Services Ltd.*, 2003 WL 1016920, at *12 (rejecting exception where party "did not provide any credible evidence to substantiate its claim . . . nor has it shown that the ALJ erred in weighing the evidence.").

Finally, Complainants suggest that the Coble Act has altered the *Ceres* standard by removing the element of actual injury. As discussed below, there is absolutely no support of any kind for this interpretation of the Coble Act amendments to the Shipping Act.

D. THE INITIAL DECISION CORRECTLY APPLIED THE COBLE ACT TO THIS MATTER

As the Commission is aware, due to the recent enactment of the Howard Coble Coast Guard and Maritime Transportation Act of 2014 (hereafter the "Coble Act") on December 18, 2014, there are few decisions interpreting and applying the new language in section 41305(e) that give the ALJ discretion to award attorney's fees to the "prevailing party." *See* 46 USC § 41305(e). Other than Judge Guthridge's Initial Decision in this case, there are only two other published decisions to date. Both concluded that (1) the Coble Act applies as of the date of its enactment, and (2) the "prevailing party" is the one who obtains an enforceable judgment. *See Baltic Auto Shipping, Inc. v. Michael Hitrinov A/K/A Michael Khitrinov and Empire United Lines Co., Inc.*, No. 14-15, 2015 WL 5573353 (FMC Sept. 15, 2015); *Edaf Antillas, Inc. v.*

Crowley Caribbean Logistics et al, No. 14-04, 2015 WL 6274657 (FMC April 15, 2015). Complainants have not provided the Commission with any valid reasons for departing from this existing authority, and their exceptions should be rejected.

1. The Initial Decision Properly Concluded that the Coble Act Applies to this Case As of December 18, 2014.

Established Supreme Court precedent provides that when a statute does not state its effective date, it should be considered effective the day it is signed into law: "It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (emphasis added).[22] "[A] court is to apply the law in effect at the time it renders its decision." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974) (emphasis added). Judge Guthridge accordingly held that the Coble Act applies to this case as of its signing date, December 18, 2014.

Complainants argue, however, that applying the Coble Act to this case produces "retroactive" results because it removes an "affirmative right of recovery and an assurance against liability for a respondent's attorney's fees."[23] Presumably, "by affirmative right to recovery," Complainants are referring to the previous version of section 41305(b), which granted attorney's fees to complainants who demonstrated a right to reparations. Complainants have not been denied an affirmative right, nor have they lost "an assurance" regarding attorney's fees.

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[22] *See also* the U.S. House of Representatives Offices of the Law Revision Counsel:

> How can I tell when a law becomes effective?
>
> Unless otherwise provided by law, an act is effective on its date of enactment. When a Code section or an amendment to a Code section is effective on a date other than its date of enactment, the Code will almost always include an effective date note under the section.

available at http://uscode.house.gov/faq.xhtml (last visited Jan. 21, 2015).

[23] Complainants' Exceptions, pp.29–31, citing *Monoson v. United States*, 516 F.3d 163, 169 (3d Cir. 2008) ("If a new law restricts or impairs the plaintiff's rights of action or the potential recovery available to him under the law in effect when suit was commenced, that new law has a retroactive effect.").

In *Landgraf*, the Supreme Court held that, "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994) (emphasis added). *Landgraf* then gave the example of *American Steel Foundaries*, where it concluded that applying a law governing the propriety of injunctive relief, enacted while the case was pending on appeal, did not affect the plaintiff's future rights. *Id.* at 273–74 (citing *Am. Steel Foundries v. Tri–City Central Trades Council*, 257 U.S. 184 (1921)). This was because the plaintiff had no "vested right" in the trial court's decree. *Id.*

At the time the Coble Act was passed in December 2014, any right Complainants had to attorney's fees was "prospective." They had not yet filed their initial brief with supporting appendix with the Commission, and therefore had no "vested right" or expectation in an attorney's fees award. *See Landgraf*, 511 U.S. at 273; *Bradley v*, 416 U.S. at 720 (Court refuses to apply intervening change to pending action where doing so would "infringe upon or deprive a person of a right that ***had matured or become unconditional.***") (emphasis added). Thus, it is undisputed that Complainants' did not have a "matured" or "unconditional" right to attorney's fees when the Coble Act was passed.

Complainants' assertion that the Coble Act is retrospective because it removes their "assurance against attorney's fees" is equally unavailing. Two days after filing their Complaint with the Commission, Complainants filed suit in federal district court under 46 U.S.C. § 41306, based on the same operative facts discussed in their FMC Complaint. In addition to requesting injunctive relief under section 41306(a), they also pleaded Shipping Act violations, Commerce Clause violations, regulatory takings, violation of Constitutional right to travel, and unlawful

user fee.[24] Subpart (d) of section 41306 allows a defendant who prevails in an action under section 41306 to recover attorney's fees. 46 U.S.C. § 41306(d). Thus, Complainants knew, long before the Coble Act was passed, that they could be liable for Respondents' attorney's fees if their claims were rejected.

In addition, Complainants had every opportunity to "adjust the course" of this litigation, if indeed the risk of attorney's fees would have actually been the deterrent Complainants claim it would. As the ALJ observed in *Edaf Antillas, Inc.*,

> In this proceeding, since the enactment of the Coble Act, the parties have been on notice (constructive, if not actual) that the Commission's power to issue an attorney fee award has been changed. From that point forward, the prevailing party - complainant or respondent - may be awarded reasonable attorney fees. **The parties could adjust their litigation decisions at that point to account for this change. It does not upset the reasonable expectations of the parties to award attorney fees to a prevailing respondent.** Therefore, I conclude that the Commission has the power to award attorney fees to respondents for attorney services performed after enactment of section 402 of the Coble Act.

Edaf Antillas, Inc., 2015 WL 6274657, at *21 (emphasis added). Complainants chose not to "adjust their litigation decisions."

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. *Landgraf*, 511 U.S. at 269 (citations omitted). "Rather, the court must ask whether the new provision ***attaches new legal consequences*** to events completed before its enactment." *Id.* at 270 (emphasis added). Applying the Coble Act to this case does not produce any "new legal consequences" for Complainants, because they were already prepared to risk liability for Respondents' attorney's fees when they filed their federal lawsuit.

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[24] *See* Verified Complaint, Section V, filed in Case No. 3:14-cv-00206, *Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking, et al v. The Board of Trustees of the Galveston Wharves, et al*; In the United States District Court for the Southern District of Texas- Galveston Division

Complainants have not offered any valid reasons for departing from *Baltic Auto Shipping* and *Edaf Antillas, Inc.*, and their exceptions on this issue should accordingly be rejected.

2. The Initial Decision Properly Concluded that Respondents Are the "Prevailing Party."

For the first time in this proceeding, Complainants argue they should be deemed the "prevailing party" if they simply establish that the Port violated the Shipping Act by not charging hotels the same $8.00 per space per month flat rate charged to Complainants. Presumably Complainants are referring to Judge Guthridge's conditional statement in the ID that, *assuming* Complainants had shown they were similarly situated or in a competitive relationship with hotels, taxicabs, limousines and buses—which the ID found they were ***not***—Complainants were accorded different treatment from these other entities.[25]

Complainants also suggest that the definition of the term "Off-Port Parking User" in the Tariff in question was the equivalent of a contract, and therefore any deviation from that definition by the Port violated the Shipping Act—even if they suffered no injury and are not entitled to any type of prospective relief such as a "cease and desist" order. As noted above, there was no intent to include hotels in the definition of "Off-Port Parking Users." Regardless, Complainants essentially argue that by deleting the "attorney's fees" language from 46 U.S.C. § 41305(b), the Coble Act eliminated the need for the fourth *Ceres* element and they can be considered the "prevailing party."

What Complainants fail to grasp is that in no manner can they be considered the "prevailing party." Not only does *Ceres* require proof of injury and proximate cause of the injury to prevail on a 46 U.S.C. § 41106(2) claim[26], but according to United States Supreme Court

[25] *See* ID, § VIII(B) (emphasis added).

[26] *Ceres*, 27 S.R.R. at 1270–71.

precedent, the "prevailing party" is the one who obtains an enforceable judgment that alters the relationship between the parties.

The phrase "prevailing party" occurs in both Federal Rule of Civil Procedure 54, as well as some federal statutes that, like the Coble Act, award attorney's fees to the prevailing party. Courts interpreting what it means to be a "prevailing party" entitled to an award of costs or attorney's fees have agreed: the "prevailing party" is the one who obtains an enforceable judgment that provides relief. *See Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992) (plaintiff must obtain "enforceable judgment" against defendant to be considered "prevailing" party and get attorney's fees under civil rights statute); *Hewitt v. Helms*, 482 U.S. 755, 762 (1987) (plaintiff had to "receive at least some relief on the merits of his claim before he can be said to prevail" and be entitled to attorney's fees under 42 U.S.C. § 1988); *Smart v. Local 702 Intern. Broth. of Elec. Workers*, 573 F.3d 523, 525 (7th Cir. 2009) (party "prevails" under Rule 54 when a final judgment awards it substantial relief); *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 896 (9th Cir. 1977) ("party in whose favor judgment is rendered is generally the prevailing party" under Rule 54).

Moreover, the Supreme Court has already rejected Complainants' argument that a single, favorable "judicial statement" can confer "prevailing party" status. *Hewitt v. Helms*, 482 U.S. at 762. The plaintiff-prisoner in *Hewitt* argued he was the "prevailing party" and therefore entitled to attorney's fees under 42 U.S.C. § 1988 because although his claims against prison officials were dismissed on grounds of immunity, he managed to obtain an interlocutory ruling that his complaint should not have originally been dismissed for failure to state a constitutional claim. *Id.* at 760. Rejecting this argument, the Court held that "the moral satisfaction [that] results from any favorable statement of law" did not bestow "prevailing party" status. *Id.* at 762. "[A]

judicial statement that does not affect the relationship between the plaintiff and the defendant is not an equivalent" for establishing prevailing party status. *Id.* at 761.

The ID's "judicial statement" acknowledging that ***if*** Complainants had shown they were similarly situated to hotels, taxicabs, etc., then they were treated differently, was not an enforceable judgment. It did not affect the relationship between Complainants and Respondents and cannot confer "prevailing party" status. *See id.*; *see also Tunison v. Continental Airlines, Inc.*, 162 F.2d 1187, 1190 (D.C. Cir. 1998) (plaintiff who obtains an empty judgment is not a "prevailing party"). In contrast, the ID's dismissal of Complainants' claims is enforceable and *does* affect the parties' relationship. The ID thus properly held that Respondents were the "prevailing parties."

3. Complainants' Arguments Based on Unequal Application of Law and Law of the Case Are Meritless and Should Be Overruled.

Complainants argue that the ALJ's dismissal of two of their causes of action alleging Shipping Act violations in November 2014 implies that the pre-Coble Act version of the Shipping Act is the "law of the case."[27] This is a gross misapplication of the doctrine. First, no such ruling can be implied because the ALJ issued this decision *prior* to enactment of the Coble Act. Judge Guthridge could not have "decided" to apply the pre-Coble Act version of the Shipping Act: it did not yet exist.

Second, Judge Guthridge did not decide any "rule of law" in that dismissal. And finally, as indicated by Supreme Court case law, the doctrine does not preclude a Court from applying a newly enacted statute. *See Am. Steel Foundries v. Tri–City Central Trades Council*, 257 U.S. 184 (1921) (affirming application of law enacted while case was pending on appeal). Complainants' "law of the case" argument should be overruled.

[27] See Complainants' Exceptions, p. 26.

Complainants' "unequal application of law" argument should also be summarily rejected. Not only do Complainants fail to provide any legal authority for their argument that applying the Coble Act results in an "unequal application of the law," but they make exaggerated assertions that have no factual basis.

For example, Complainants assert that prior to the Coble Act, they were "guaranteed" recovery of attorney's fees.[28] Obviously, Complainants were not "guaranteed" anything when they filed this case, and regardless, they have no evidence of reparations. Then on page 26, Complainants claim that applying the Coble Act will produce a "double standard." This argument presumably refers to the standard for recovering attorney's fees prior to December 18, 2014, versus the standard after, but no such "double standard" exists. Complainants were entitled to recover attorney's fees both before and after the Coble Act's passage. Respondents were not. Indeed, prior to the Coble Act, Respondents had no remedy for legal fees incurred while defending against frivolous and unfounded claims.

In fact, the American Association of Port Authorities ("AAPA") initiated the Coble Act revisions to address such conduct:

> AAPA initiated this change in the attorneys fees provision of the Shipping Act because its members believe that the prior one-sided provision was artificially encouraging actions against ports by large well financed private parties attempting to improve their bargaining position in commercial negotiations with public port authorities by filing Shipping Act claims against them.[29]

This lawsuit provides a perfect example of such conduct. Complainants filed this lawsuit knowing full well they had no evidence of actual injury. Respondents are governmental, non-tax supported entities who would not have even imposed the Tariff fees at issue, had they possessed

[28] See Complainants' Exceptions, pp. 25, 30.

[29] August 6, 2015, Comments from the AAPA filed in Docket No. 15-06, p.2.

other means to support the Cruise Terminal operation. As a result of Complainants' meritless allegations, Respondents have been forced to expend hundreds of thousands of dollars in legal fees.

Respondents would show that one of the main reasons this proceeding was filed and prosecuted was to force the Port to back down and unilaterally change its Tariff to avoid these legal fees. As Complainants took advantage of their procedural right to shoot with a proverbial shotgun, Respondents were required to address each piece of buckshot coming their way. Complainants' silence in the face of Judge Guthridge's Dismissal of Respondent Galveston Port Facilities Corporation[30] is further evidence of their tacit admission that their claims against it were groundless.

Thus, contrary to Complainants' argument, applying the Coble Act to this case actually ***remedies*** a previous "double standard" as to ***Respondents*** who had to defend against groundless claims. The Commission should accordingly overrule Complainants' exceptions. In addition, the Commission should rule that Complainants have failed to timely appeal the dismissal of Respondent Galveston Port Facilities Corporation, and issue a finding that the claims against the Galveston Port Facilities Corporation were unfounded.

V. CONCLUSION

For the foregoing reasons, Complainants' Exceptions should be denied and Judge Guthridge's decision should be approved in its entirety.

Dated: February 2, 2016

[30] *See* ID, p.25.

Respectfully submitted,

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CERTIFICATE OF SERVICE *

I hereby certify that I electronically filed this document on this **2nd day of February, 2016**, and that a true and correct copy of the foregoing was served on all counsel of record ***via*** certified mail – return receipt requested and email, as indicated below:

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